STATE OF IOWA
PROPERTY ASSESSMENT APPEAL BOARD

Leo H. & Mary J. Frueh, Petitioners-Appellants, **v.** **Dubuque County Board of Review,** Respondent-Appellee.	**ORDER** **Docket No. 11-31-0313** **Parcel No. 1926280004**

On March 12, 2012, the above captioned appeal came on for hearing before the Iowa Property Assessment Appeal Board. The hearing was conducted under Iowa Code section 441.37A(2)(a-b) and Iowa Administrative Code rules 701-71.21(1) et al. The Appellants Leo H. and Mary J. Frueh were self-represented. Assistant County Attorney Mark Hostager is counsel for the Board of Review, and he represented it at hearing. Both parties submitted evidence and testimony in support of their positions. The Appeal Board having reviewed the entire record, heard the testimony, and being fully advised, finds:

Findings of Fact

The Fruehs, owners of a property located at 1621 McCabe Lane, Cascade, Iowa, appeal from the Dubuque County Board of Review regarding their 2011 property assessment. The 2011 assessed valuation was $502,106, allocated as $25,070 to the land and $477,036 to the improvements. The property is classified commercial.

The Fruehs protested to the Board of Review claiming (1) the subject property was assessed for more than the value authorized by law under Iowa Code section 441.37(1)(b); and (2) the subject property was not assessable, is exempt from taxes, or is misclassified under section 441.37(1)(c).[1] The Board of Review granted the protest, in part, and reduced the total assessment to $425,000, allocated

[1] Although some information was listed in the fraud section of the petition, the Fruehs explained they were not making a fraud claim. The parties agreed at hearing, the central issue is the classification of the parcel.

$25,070 to land value and $399,930 to improvement value. It did not change the classification of the property.

The Fruehs then appealed to this Board, reasserting the single claim that the subject property is misclassified. They seek reclassification of the parcel as agricultural.[2]

The subject site is 3.07 acres. It is improved by a 20,000 square foot building. Approximately 10,000 square feet of the building is used for cold storage of bare-root nursery plants. The remainder of the building, where there is a large over-head door, is used primarily for "processing" the plants by grading, bundling, packaging, and preparing them for shipping. The area also includes three offices and an employee break room.

Three witnesses testified regarding the history of the subject property. Mary and Leo Frueh testified on their own behalf, and County Assessor Dave Kubik testified on behalf of the Board of Review.

The subject property and surrounding area was once platted as the village of Hempstead. The village was never developed, and it appears the County either never claimed or abandoned the rights to any streets. The Fruehs now have title to those streets.

Mary Frueh testified they started Cascade Forestry in 1975. The original operation was located a short distance from the subject property and is still in operation. That location had a smaller building on it, which was formerly a bar and dance hall and was already zoned commercial. However, in 1999, the operation needed to expand and they determined it was necessary to construct a larger building devoted to storing and processing the nursery plants. They decided to put the building on the subject property.

In 1999, the six legally described lots consisted of additional nursery space and the area where the new building would be constructed. Because of the Hempstead platting, and because some of the

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[2] Since agricultural property is valued differently than commercial property, a classification change would necessitate a revaluation of the land and improvements.

"locals" were objecting to them building on the property. Fruehs applied for a building permit and were subsequently misinformed by the Health & Zoning Administrator and County Attorney that it was necessary for them to apply for a change in zoning from agricultural to business. Fruehs believed they were acting prudently and followed through with the rezoning. The result was that two of the six legal lots were changed from agricultural zoning to B-1 business zoning. Fruehs then erected the building. At that time, all six legally described lots were assessed as one unit (parcel #1926280001), and were classified commercial.

The Fruehs sold their interest in the property on contract in 2005 and reacquired it in 2008. Around that time, the nursery's name was changed from Cascade Nursery to Iawisil. The business is organized as a subchapter S corporation.

Assessor Kubik testified the Fruehs protested to the Board of Review in 2010. At that time, the Board divided the single assessment unit (parcel #1926280001) into two new assessment units, each consisting of three legally described lots. The Board of Review retained the commercial classification on the 3.070-acre subject property (parcel #1926280004). The remaining 2.91-acre adjoining parcel's (#1926280003) classification was changed to agricultural.

The Fruehs contend the subject property should be classified agricultural because it is part of the larger operation and the building is used for agricultural purposes. The Board of Review disagrees and contends the building is used for commercial purposes.

Fruehs assert the subject property is being used as part of their nursery business in raising and harvesting trees and plants. She describes Iawisil as part of an integrated conservation reserve planting program. According to the evidence, the seedlings and nursery stock are used for reforestation, windbreaks, riparian buffers, and wildlife food and habitat. Ms. Frueh testified the operation is a bare-root nursery that requires high-humidity, cold storage to hold the plants dormant and keep them from budding. The nursery operates by growing the plants, and then in the early spring, before the trees

bud, pulling them out of the ground. The trees are then taken into the building located on the subject property where they are prepared for storage while awaiting shipping. The subject parcel is surrounded by six acres of nursery trees that will be harvested and stored in the building.

The cold storage part of the building is shut off in the summer because it would be extremely expensive to operate. Any plants that are not shipped out in the spring are typically put back into the ground or destroyed.

The nursery has three fulltime employees, approximately thirty seasonal employees in the spring, and six in the fall. Ms. Frueh also reported the property is considered a farm by the federal government, and the employees are considered agricultural employees. Additionally, the vehicles are taxed as agricultural.

The property, including the adjoining land used for the nursery, has been listed for sale for the past one-and-one-half years without any offers. The sale listing advertises the building as commercial. The Fruehs expressed their desire to sell the property as a nursery, but noted at this time in their life, it is important for them to sell however possible.

It appears as part of the business, the Fruehs also advertise several forestry services including weed and grass control, tree planting and plantation care, timber sale administration, timber appraisals, and consulting services. Ms. Frueh testified the equipment for these services is located at their other site, not in the cold storage building, even though some paper work may be done there.

Assessor Kubik testified regarding the Board of Review's position that the property is properly classified commercial. In Kubik's opinion the trees in cold storage were dormant; and therefore, the trees were not "growing."

Kubik also attempted to compare the subject property to a sale barn. He claimed that farm animals (an agricultural product) are taken to a sale barn, sold, sorted, and shipped out. Typically, the

sale barn is classified commercial. It is his belief the subject property is similar in that the plants are brought in and sold from the location.

Kubik was questioned how the property would compare to a grain silo, a dairy operation, or an apple orchard with a building on it, and he attempted to draw distinctions. He admitted that with grain silos, if the farmer owns the whole thing, it is part of an agricultural operation; however, he refused to admit any agricultural activity was occurring on the subject property because he does not believe the trees are growing.

Kubik did acknowledge the adjoining nursery area is correctly classified agricultural.

The Board of Review also called Cary Halfpop, Chief Appraiser for the Iowa Department of Revenue Property Tax Division, as a witness. Halfpop testified it may be appropriate to classify separate legal parcels of property differently. He stated, "If there are distinctly different uses, you can classify them separately." He gave the example of half a city block, with four individual lots, all owned by the same person. He elaborated, "And on lots 1 and 2, is my . . . dwelling with a detached garage on it and on lots 3 and 4 is my hardware store. I think it would certainly be appropriate that lots 1 and 2 be classified residential lots and 3 and 4 be classified commercial even though common ownership." He was not asked to give his opinion about the proper classification in this particular case.

Halfpop, on cross-examination, also testified that zoning does not dictate classification, even though in some cases they are the same. He noted that classification always deals with how the property is being used. He also indicated that when property is used in conjunction with a larger operation it may have the same classification.

Conclusions of Law

The Appeal Board applied the following law.

The Appeal Board has jurisdiction of this matter under Iowa Code sections 421.1A and 441.37A (2011). This Board is an agency and the provisions of the Administrative Procedure Act apply to it. Iowa Code § 17A.2(1). This appeal is a contested case. § 441.37A(1)(b). The Appeal Board determines anew all questions arising before the Board of Review related to the liability of the property to assessment or the assessed amount. § 441.37A(3)(a). The Appeal Board considers only those grounds presented to or considered by the Board of Review. § 441.37A(1)(b). But new or additional evidence may be introduced. *Id.* The Appeal Board considers the record as a whole and all of the evidence regardless of who introduced it. § 441.37A(3)(a); *see also Hy-vee, Inc. v. Employment Appeal Bd.*, 710 N.W.2d 1, 3 (Iowa 2005). There is no presumption that the assessed value is correct. § 441.37A(3)(a).

In Iowa, property is to be valued at its actual value. Iowa Code § 441.21(1)(a). Actual value is the property's fair and reasonable market value. *Id.* "Market value" essentially is defined as the value established in an arm's-length sale of the property. § 441.21(1)(b). However, if property is classified agricultural it is to be assessed and valued based on its productivity and net earning capacity. Iowa Code § 441.21(1)(e).

The Iowa Department of Revenue has promulgated rules for the classification and valuation of real estate. *See* Iowa Admin. Code Ch. 701-71.1. Classifications are based on the best judgment of the assessor exercised following the guidelines set out in the rule. *Id.* Boards of Review, as well as assessors, are required to adhere to the rules when they classify property and exercise assessment functions. *Id.* r. 701-71.1(2). "Under administrative regulations adopted by the . . . Department . . . the determination of whether a particular property is 'agricultural' or [residential] is to be decided on the

basis of its primary use." *Sevde v. Bd. of Review of City of Ames*, 434 N.W.2d 878, 880 (Iowa 1989).

There can be only one classification per property. Iowa Admin. r. 701-71.1(1).

> By administrative rule, commercial property
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> shall include all lands and improvements and structures located thereon which are primarily used or intended as a place of business where goods, wares, services, or merchandise is stored or offered for sale at wholesale or retail. Commercial realty shall also include hotels, motels, rest homes, structures, consisting of three or more separate living quarters and any other buildings for human habitation that are used as a commercial venture.

Iowa Admin. Code r. 701-71.1(5).

> Conversely, agricultural property
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> shall include all tracts of land and the improvements and structures located on them which are in good faith used primarily for agricultural purposes except buildings which are primarily used or intended for human habitation as defined in subrule 71.1(4). Land and the nonresidential improvements and structures located on it shall be considered to be used primarily for agricultural purposes if its principal use is devoted to the raising and harvesting of crops or forest or fruit trees, the rearing, feeding, and management of livestock, or horticulture, all for intended profit.
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> . . .
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> Agricultural real estate shall also include woodland, wasteland, and pastureland, but only if that land is held or operated in conjunction with agricultural real estate as defined in this subrule.

Iowa Admin. Code r. 701-71.1(3).

While the Board of Review maintains the subject property and building is used for commercial purposes and correctly classified. we cannot agree. The Board of Review believes the subject property, with its building, should viewed in a vacuum, and the surrounding property Iawisil uses to grow the trees plays no part in the subject property's classification. It believes *Sevde*, prohibits considering the two parcels together. However, in *Sevde*, the Iowa Supreme Court noted the manifest purpose of Iowa Code section 427.8 is to "forbid lump valuation of large areas." Section 428.7, however. clearly states that assessors *can* combine legally described lots to value the property as a *unit*. In fact, in this case, the subject parcel includes three separate legally described lots. The other parcel (#1926280003) with the growing plants also includes three legally described lots. As we noted, all six

legally described lots were assessed as one parcel prior to 2010 when the Board of Review then, somewhat arbitrarily, divided the lots into two assessment parcels. Considering the subject property together with the other assessment parcel (#1926280003) does not violate the prohibition noted in *Sevde* since the parcels operate as a unit, with common ownership. Additionally, although not applicable to this case, we note the agricultural subrule even contemplates considering lands used for agricultural operations in conjunctions with one another. Iowa Admin. Code r. 701-71.1(3) (permitting woodland, wasteland, and pastureland to be classified agricultural if it is held or operated in conjunction with other agricultural real estate). Fruehs have proved the subject property operates as part of Iawisil Nursery. Iawisil is an agricultural use and the building on the subject property is operated in conjunction with, and as an essential part of, the agricultural operation. Thus, the subject building and land is used primarily for agricultural purposes.

Additionally, considering the division of the legally described lots and subsequently assigned parcels, we note it would be impossible for the parcel where the trees are growing (#1926280003) to be accessed without crossing the subject property because all driveways are located on the subject property. The division in use the Board of Review proffers would create a land-locked agricultural parcel. It also bears no association to Halfpop's city block example where there are two clear and distinct uses. The building is used for cold storage for the bare-root plants raised by the surrounding Iawisil nursery. It does not operate as a separate and independent commercial use.

Although Kubik believed the plants in the cold storage were not "growing" and, therefore, were not an agricultural use, we also disagree. Testimony indicated that in the bare-root method, the cold storage phase prevents budding and controls the growth cycle to better coordinate with the planting schedules, and that cold storage is essential. Even though the plants are not *actively* growing, does not mean they are done growing. Furthermore, even if the plants were done growing, agricultural property includes "land and the *nonresidential improvements and structures* located on it devoted to the raising

and *harvesting* of . . . forest or fruit trees." Iowa Admin. Code r. 701-71.1(3) (emphasis added). Harvested crops, such as corn, which would be stored in a grain silo, are not growing either. In this case, the Fruehs unequivocally testified the building is devoted to harvesting the bare-root trees and storing them in a temperature controlled environment until they are shipped. Therefore, the building is dedicated to harvesting the trees and qualifies as an agricultural use of the land.

Likewise, regarding all of the analogies at hearing, we draw a distinction between commercial sale barns and the subject property. Moreover, we find the subject property more akin to a grain silo. Kubik compared the subject property to a sale barn. However, a sale barn property is not typically operated as a unit, or part of a larger agricultural operation, with common ownership. But, in this case, the property is operated as a unit with the nursery and with common ownership. The subject property is akin to a grain silo, where the agricultural product is *harvested* and stored until sold. The grain bin serves the greater agricultural operation by providing a place to store the agricultural product until it is sold to a third party.

We also find the additional services promoted in Iawisil's brochure do not make the subject property commercial. The Board of Review pointed out these services in its cross-examination of the Fruehs. We find these services are mostly related to selling the trees raised by Iawisil. The Iawisil brochure (Exhibit 5) discusses how appropriate planting of the trees is important to successfully establishing a forest and/or windbreak. These services are not common weed and grass maintenance services that one might think of in a residential setting. Furthermore, we find these services are incidental to the nursery operation itself, and it appears, most are actually done in conjunction with various other entities.

The Board of Review also attempted to draw a parallel between this case and *Cott v. Board of Review*, 442 N.W.2d 78 (Iowa 1989). The Board of Review appears to believe some presumption of continuity exists in this case because the property has been treated as commercial property, and

classified the same, since 1999. However, *Cott* addresses a continuity of use for *prior adjudications*. *Id.* at 81. There have been no prior court adjudications relating to the correct classification of the subject property. The reliance on the case, is therefore, misplaced.

Finally, we recognize that in other agricultural classification cases that have been appealed to this Board, "factors" regarding the good faith use of the property for agricultural purposes have often been argued. These "factors" arise from *Colvin v. Story County Board of Review*, 653 N.W.2d 345, 350 (Iowa 2002). However, it is clear the Supreme Court did not hold these "factors" were necessary considerations for classification decisions. *See Polk County Bd. of Review v. Property Assessment Appeal Bd.*, 2010 WL 3155049 (Iowa Ct. App. 2010) (unpublished); *Polk County Bd. of Review v. Property Assessment Appeal Bd.*, 2010 WL 3155273 (Iowa Ct. App. 2010) (unpublished). In fact, the "factors" are wholly outside the rule, which states classification is to be done "following the guidelines *set forth in the rule*." Iowa Admin. Code r. 701-71.1(1).

However, even if we were to consider the "factors," this Board would still conclude the subject property is being used for agricultural purposes. The zoning of the property is not determinative. Zoning permits commercial use, or any lesser use (including agriculture). Furthermore, despite the fact the property is being marketed as a commercial building, it is clear the building's current *use* is for an agricultural purpose. The building can simply be marketed as a commercial building because it is zoned as such.

This Board finds the subject site, in conjunction with the adjoining nursery as a unit, is operated for agricultural purposes. Furthermore, it is clear the nursery is operated with intent to profit, and this issue was not in dispute. Many agricultural classification cases that appear before this Board are fact intensive. After careful consideration of all of the facts, we are convinced Fruehs' cold storage facility for its bare-root plants is an integral part of the nursery business that takes place on the surrounding

land. The subject property, including the building is being used for an agricultural purpose since it is part of the harvesting of the bare-root trees. As such, it should be classified agricultural.

Following Iowa law and administrative rules governing the classification of real estate, we find the preponderance of the evidence in the record demonstrates Fruehs' use of the property as part of their bare-root nursery as of January 1, 2011, supports the claim that the property is misclassified.

THE APPEAL BOARD ORDERS the January 1, 2011, assessment of the Fruehs' property located at 1621 McCabe Lane, Cascade, Iowa, is classified agricultural realty.

In order to properly value the property as agricultural realty, we order the Board of Review to determine the agricultural land and agricultural building values using the appropriate method prescribed by law and report those values to this Board within 20 days of the date of this Order. Once those values are provided, we will enter an order establishing the agricultural value of the subject property.

The Secretary of the State of Iowa Property Assessment Appeal Board shall mail a copy of this Order to the Dubuque County Auditor and all tax records, assessment books and other records pertaining to the assessment referenced herein on the subject parcel shall be corrected accordingly.

Dated this 18th day of May, 2012.

Jacqueline Rypma

Jacqueline Rypma, Presiding Officer

Richard Stradley, Board Chair

Karen Oberman, Board Member

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Certificate of Service
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause & to each of the attorney(s) of record herein at their respective addresses disclosed on the pleadings on 5/18, 2012
By: ✓ U.S. Mail ___ FAX
___ Hand Delivered ___ Overnight Courier
___ Certified Mail ___ Other
Signature